In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1286

LEONARD ROYALL AIKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2–13) is reported at 373 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1967. A petition for rehearing was denied on March 17, 1967. The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED

1. Whether the trial judge properly permitted a government witness to invoke his privilege against

self-incrimination as to certain questions asked on cross-examination.

2. Whether petitioner's constitutional rights were violated by the absence of a preliminary hearing.

3. Whether the court's instruction regarding the statutory presumption created by 21 U.S.C. 174 constituted an impermissible comment on petitioner's failure to take the witness stand.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense * * * the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

A nine-count indictment charged petitioner and eight others[1] with violating the federal narcotics laws (Counts 2–8), and conspiracy to do so (Count 1). Petitioner, named only in the conspiracy count, was convicted by a jury in the United States District Court for the Southern District of New York. On August 10, 1966, he was sentenced to imprisonment for twenty-five years and fined $20,000. The court of appeals affirmed (Pet. App. 2–13).

The evidence showed that, during 1963 and 1964, petitioner was the head and co-defendant Leroy Davis his second in command of an organization engaged in large-scale distribution of narcotics in New York City, particularly in Harlem. Other co-defendants received their supplies of narcotics from Davis or petitioner, diluted them, and distributed them for profit.

A distributor, Edward Walker, testified that in the early part of 1963 he traveled with petitioner and Davis to a building located in the Bronx. When they reached their destination, Walker remained in the automombile, petitioner maintained a surveillance, and Davis entered the building, later emerging with two foot-lockers containing narcotics. Walker and Davis loaded the trunks in the car, after which they drove away (Tr. 2996–3005).[2] A few weeks later, at

[1] Five defendants were tried with petitioner: Webster Bivens, Charles Cole, Leroy Davis, Nolan Johnson, and Clifford Rogers. All but Johnson were convicted of one or more counts. The remaining three defendants, George Henderson, Ronald Scott and Raymont Spratley were severed and testified for the government at the trial of their co-defendants.

[2] Citations are to the trial transcript, filed with the Clerk of this Court.

a bar in Harlem, Davis told Walker that he needed help later that evening. Davis explained that he wanted Walker to assist him when he made deliveries of narcotics. Asked by Walker what pay he would receive, Davis replied that he did not know, but would have to ask petitioner (Tr. 3010). On three different evenings, Walker, accompanying Davis on his rounds, placed packages at various locations, and then waited to see that they were picked up (Tr. 3011–3012). In February or March 1963, at petitioner's behest, Walker was sent to Chicago, where he delivered a quantity of narcotics to a prearranged address (Tr. 3018–3024). On his return, Walker met petitioner, who asked if everything had gone well. Walker replied affirmatively (Tr. 3024). In March 1963, Walker assisted petitioner in diluting and bagging narcotics (Tr. 3026–3045).

In March 1963, George Henderson, one of the severed defendants, met petitioner at a bar in Harlem. Henderson gave petitioner $225, and requested a half-ounce of heroin. Petitioner told Henderson to wait a short while. That evening, at the bar, Davis approached Henderson and suggested that they meet at a certain street corner. Later that evening, Davis delivered the heroin to Henderson at the prearranged location (Tr. 1020–1027). From that time until August 1963, Henderson obtained his narcotics from co-defendants Webster Bivens or Charles Cole (Tr. 1035–1114). In September, Henderson bought narcotics from Davis and sold it to an undercover agent of the Federal Bureau of Narcotics (Tr. 1123–

1134). Henderson made a second sale to agent Peterson in November 1963 (Tr. 1135–1136).

After November, Henderson was in almost daily contact with petitioner. In December, he gave petitioner $900 to purchase two ounces of heroin, subsequently delivered by Davis (Tr. 1136–1140). Two weeks later, petitioner settled a dispute between Henderson and Davis involving the quality of some narcotics purchased by Henderson from one of Davis'. associates. Henderson overheard petitioner tell Davis to have his associate give Henderson another ounce of heroin in settlement (Tr. 1140–1146, 1229–1235). Henderson was arrested in February 1964, and thereafter agreed to cooperate with the Bureau of Narcotics (Tr. 1146).

In May 1964, co-defendant Ronald Scott met petitioner at a Harlem bar. He *told petitioner* that he had recently left prison; that things were not going too well; but that he had made contact with someone from out of town who had expresssed willingness to purchase narcotics from him. Petitioner advanced Scott $700, and said that he would keep Scott in mind. The next month, Scott discussed his financial problems with Davis, who advanced him $100 (Tr. 2414). A week late, Scott returned $800 to Davis, and indicated his hope that the repayment would hasten matters (Tr. 2424–2426). In July 1964, Scott made his first purchase of narcotics from Davis (Tr. 2444–2445). A few days later Scott attempted to transact a sale of narcotics with his out-of-town contact. The value of the narcotics, to be obtained from petitioner and Davis, exceeded $17,000. Scott was arrested be-

fore the transaction was completed; his "out of town contact" was agent Peterson (Tr. 2450–2472).

ARGUMENT

1. At trial, Edward Walker testified at length for the government. He responded to several introductory questions about his background, and then described how he assisted petitioner and Davis in the distribution of narcotics from January to March 1963. He also admitted having a prior conviction for conspiracy to deal in narcotics, and stated that he had used cocaine on three or four occasions (Tr. 2991, 3033). On cross-examination, counsel for Davis concentrated on the circumstances surrounding Walker's arrest on unrelated charges in March 1965, at which time a search of his apartment uncovered a pistol. When asked by counsel whether the gun was his, Walker refused to answer, and the court sustained his right to assert his privilege against self-incrimination (Tr. 3057). Thereafter, counsel posed numerous questions regarding the circumstances surrounding the 1965 arrest. In most instances the court permitted Walker to invoke his privilege (Tr. 3059–3081, 3091–3127).[3] During the cross-examination the judge twice advised defense counsel that he would limit this line of questioning because counsel was inquiring into a collateral matter, occurring two years after the events described by Walker on direct examination (Tr. 3104, 3114). The court explained to the jury (Tr. 3142):

[3] On a few occasions the court determined that Walker had improperly refused to reply to a question, and ordered him to answer (Tr. 3118, 3119, 3167).

> He has no privilege at all upon anything that he has testified to which touches on this case. He must answer. But these matters which are directed towards his credibility and which have nothing to do with the incidents in our case, he may stand on his constitutional right and refuse to answer any question which will incriminate him.

Such rulings did not improperly curtail petitioner's right of cross-examination. The questions involved collateral matters and exceeded the legitimate bounds of cross-examination by attempting to delve into facts surrounding Walker's 1965 arrest. The court, exercising its discretion, set reasonable limits on the scope of cross-examination, and properly restricted tangential inquiries in an already lengthy trial. *United States* v. *Marks*, 368 F. 2d 566 (C.A. 2), certiorari denied, 386 U.S. 933; *United States* v. *Kahn*, 366 F. 2d 259 (C.A. 2), certiorari denied, 385 U.S. 948; *United States* v. *Irwin*, 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967.

2. On November 2, 1964, petitioner was taken before a Commissioner who set bail (which petitioner posted). Over his objection the preliminary hearing was postponed (R. 107–119). An indictment was returned on December 18 and no preliminary hearing was held.

Relying upon decisions of the District of Columbia Circuit,[4] petitioner argues that he was denied a fair

[4] *Ross* v. *Sirica*, No. 20, 535, and *Blue* v. *United States*, 342 F. 2d 894, certiorari denied, 380 U.S. 944. Contrary to petitioner's statement (Pet. 11), the government did not petition for certiorari in *Blue*. The petition was filed by Blue, whose conviction had been affirmed.

trial because he did not have the opportunity for discovery which a preliminary hearing would have afforded. Aside from the special province of the court of appeals to fashion rules for that circuit, petitioner's reliance on those cases is misplaced. They hold only that an accused may compel a preliminary hearing if he seeks it. While the judges of the District of Columbia Court of Appeals conflict in their opinions as to the precise functions served by preliminary hearings, all are in accord that where, as here, the defendant fails to take the remedial steps outlined in *Blue* before trial, reversal of a conviction is not appropriate unless there is some basis for concluding that the trial itself was prejudiced by the lack of a preliminary hearing. *Shelton* v. *United States,* 343 F. 2d 347, certiorari denied, 382 U.S. 856; *Blue* v. *United States, supra.* Clearly, petitioner has made no such showing.

3. As part of his detailed closing instructions (Tr. 4180–4296), the trial judge charged that, according to the underlying statute, one of the elements of the offense charged, knowledge that the narcotics were illegally imported, could be inferred from possession of the narcotics unless the defense explained such possession to the jury's satisfaction. Petitioner did not object to this instruction at trial; he now alleges that it constituted an improper comment on his failure to testify. To the contrary, a reading of the court's instructions in their entirety shows that the court's reference was "carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand."

United States v. *Gainey*, 380 U.S. 63, 71. Indeed, the court advised the jury that where a defendant had not testified (Tr. 4248):

> * * * you may not consider this against him as a basis either for a presumption or an inference unfavorable to him. He is exercising his constitutional privilege. You must not permit such fact to weigh in the slightest degree against the defendant, nor should it even enter into your discussions or your deliberations.

See *United States* v. *Armone*, 363 F. 2d 385 (C.A. 2), certiorari denied, 385 U.S. 957.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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